

4.2.27 Correspondence from Ms McMullan to the agency head of the Federal Court of Australia Statutory Agency dated Wednesday, 23 December 2020

213 On Wednesday, 23 December 2020, Ms McMullan sent an email to Ms Lagos.⁸²
Ms McMullan's email to Ms Lagos, dated Wednesday, 23 December 2020, reads as follows:

Dear Ms Lagos,

Please see attached correspondence in regard to a public interest disclosure matter.

Regards

Kate

214 Attached to Ms McMullan's email was a document containing substantive correspondence about the findings Ms McMullan made as part of her investigations into the public interest disclosure allocated to the APSC on Monday, 11 May 2020. That item of correspondence is replicated as Annexure EDR – 46B.

5. DISCLOSURE INVESTIGATION RELATING TO AN INTERNAL DISCLOSURE WAS CONDUCTED (WHETHER OR NOT UNDER PART 3 OF THE PID ACT), AND THE DISCLOSER BELIEVES ON REASONABLE GROUNDS THAT THE INVESTIGATION, AND THE RESPONSE TO THE INVESTIGATION, WERE INADEQUATE – ALLEGATIONS RELATING TO THE RECRUITMENT OF MS CAITLIN WU

5.1 Allegations set out in the internal disclosure allocated to the APSC for handling on Monday, 11 May 2020

215 As has already been noted, the internal disclosure that I made to an authorised officer in the Office of the Commonwealth Ombudsman on Monday, 23 March 2020 was allocated to the APSC for handling on Monday 11, May 2020.

216 Part 6 of the internal disclosure report contained the allegations relating to the recruitment of Ms Caitlin Wu and how the Code of Conduct in the PS Act had been contravened. Part 6 of the internal disclosure report has not been replicated in this external disclosure report because it is possible to substantively engage with the issues raised in part 6 of the internal disclosure report based on the information set out in part 5 of this external disclosure report.

⁸² Annexure EDR – 46A.

5.2 Transfer of investigation of contraventions of the Code of Conduct to the APSC

217 As was noted in part 2.1.3 of this external disclosure report, in part 7 of the internal disclosure report, I had set out my reasons as to why the internal disclosure had been made to an authorised officer in the Office of the Commonwealth Ombudsman. In part 7 of the internal disclosure report, I had formed the view that the ideal way to investigate the allegations set out in the internal disclosure report would be for the authorised officer in the Office of the Commonwealth Ombudsman to allocate the disclosure to the Office of the Commonwealth Ombudsman and to then transfer the investigation of the disclosure to the APSC under the relevant provisions of the *Ombudsman Act 1976* (Cth).

218 That is not what occurred.

219 On Friday, 1 May 2020, the authorised officer in the Office of the Commonwealth Ombudsman wrote to me. In her correspondence, the authorised officer stated:⁸³

I refer to your disclosure to our Office regarding the conduct of staff at the Federal Court Statutory Agency (FCSA).

I have finalised my assessment under s 26 of the *Public Interest Disclosure Act 2013* (PID Act) of the information you provided to our Office. I am writing to advise you that I have assessed the information you provided as meeting the threshold of a public interest disclosure (PID).

This assessment determines whether your disclosure is a 'public interest disclosure' (PID), and whether or not the disclosure will be allocated to an agency for handling.

The assessment does not determine whether or not disclosable conduct has occurred, and does not constitute an investigation of a disclosure.

220 The authorised officer then went on to note:⁸⁴

Having assessed your disclosure as a PID, the PID Act requires an Authorised Officer to allocate the handling of the PID to one or more agencies.

In the case of your PID, I have decided to allocate it to the Australian Public Service Commission (APSC) for handling. This is in view of the fact that your allegations implicate

⁸³ Annexure EDR – 2.

⁸⁴ Annexure EDR – 2.

both Mr Warwick Soden and Ms Sia Lagos – the FCSA’s substantive and acting agency heads respectively – and relate to alleged Code of Conduct breaches under the *Public Service Act 1999*.

While you proposed an alternative mechanism by which the disclosure could be allocated initially to our Office, and then transferred to the APSC under the *Ombudsman Act 1976*, this is not our usual practice in such circumstances. We consider it more appropriate to allocate disclosures relating to agency heads directly to the APSC, under the PID Act, noting the broad discretion under s 43(3)(b) to consider all relevant matters when deciding the allocation.

221 While I had misgivings about the authorised officer’s approach to allocating the disclosure to the APSC under the PID Act (which I flagged in an email dated Tuesday, 21 April 2020 to the authorised officer in the Office of the Commonwealth Ombudsman), I did not make too much of a fuss about it as I was anxious for the substance of the allegations in the internal disclosure report to be considered; more than five weeks had passed since I had made the internal disclosure to the authorised officer in the Office of the Commonwealth Ombudsman and, despite the requirement for the authorised officer to use her best endeavours to decide the allocation of the disclosure within 14 days after the disclosure was made,⁸⁵ the disclosure had yet to be allocated. The disclosure would be allocated to the APSC on Monday, 11 May 2020.⁸⁶

222 Importantly, the primary reasons for the allocation of the internal disclosure to the APSC were that:

- ‘the allegations implicate both Mr Warwick Soden and Ms Sia Lagos – the FCSA’s substantive and acting agency heads respectively’; and
- the allegations ‘relate to alleged Code of Conduct breaches under the *Public Service Act 1999*’.

223 I take it for granted that Ms McMullan was aware that the reason that the internal disclosure had been allocated to the APSC was because the allegation related to breaches of the Code of Conduct under the PS Act. The allegations did not relate to the conduct of any officials in the APSC and throughout the internal disclosure report, I referred extensively to contraventions of

⁸⁵ PID Act, s 43(5).

⁸⁶ Annexure EDR – 5.

the Code of Conduct. While I did make disclosures about the Federal Court of Australia Statutory Agency, I had pointedly made the following comments in part 3.2 of the internal disclosure report:

As briefly alluded to in Part 1.1, much of the disclosable conduct, as will be seen, arises in the context of engaging employees under the PS Act. I shall allege that at least some of the disclosable conduct was engaged in by Ms Lagos, Mr Pringle and or Ms Jarratt, among others. Where I do not have sufficient recorded evidence to reasonably justify alleging that Ms Lagos, Mr Pringle and or Ms Jarratt engaged in the activities that have given rise to the disclosable conduct, I shall allege that the Federal Court Statutory Agency engaged in the disclosable conduct. That being said, I will not shy away from providing my understanding of the context of the activities that have given rise to the disclosable conduct and this context might include my understanding of the roles Ms Lagos, Mr Pringle and or Ms Jarratt.

224 It could not be said that Ms McMullan was unaware that the contents of the internal disclosure report primarily related to allegations of contraventions of the Code of Conduct by APS employees and the agency head of the Federal Court of Australia Statutory Agency. The significance of the observations made in part 5.2 of this external disclosure report will become apparent during the analysis of that part of Ms McMullan's investigation report that relates to the consideration of allegations made about the recruitment of Ms Wu.

5.3 Relevant facts and evidence

225 It is, in my opinion, useful to set out relevant background facts relating to the recruitment of Ms Wu in the body of this external disclosure report, especially because new and relevant evidence, which Ms McMullan had access to during her investigation, has come to my attention since the internal disclosure report was submitted to an authorised officer in the Office of the Commonwealth Ombudsman on Monday, 23 March 2020.

5.3.1 Notification of vacancy NN 10690165

226 On Friday, 18 September 2020, Ms McMullan was provided with documents relating to the recruitment of Ms Caitlin Wu into the position of NCF Registrar.⁸⁷

⁸⁷ Annexure EDR – 20, Annexure EDR – 21.

227 Ms McMullan was provided with a vacancy notification for an NCF Registrar position in the Federal Court of Australia Statutory Agency.⁸⁸ The relevant vacancy number was NN 10690165. The vacancy notification which Ms McMullan was provided with broadly corresponds to the vacancy notification that I had identified in my internal disclosure report at part 6.1. At part 6.1 of my internal disclosure report, I had noted:

It appears that Ms Wu successfully secured the position advertised as Vacancy NN 10690165, being a full-time, ongoing NCF Registrar position, which was notified in Public Service Gazette No PS38 – 22 September 2016.⁸⁹

228 It cannot go unnoticed that, under the formal qualifications section of the vacancy notice that Ms McMullan was provided with, the following is noted:

This position requires the occupant to perform statutory legal function (sic) as required. Therefore, legal qualifications and admission as a practitioner of the High Court or the Supreme Court of a State or Territory of Australia is (sic) essential.⁹⁰

229 Ms McMullan was also provided with a position description of the NCF Registrar vacancy on Friday, 18 September 2020. That position description is set out in Annexure EDR – 48.

230 It cannot go unnoticed that, under the formal qualifications section of the position description that Ms McMullan was provided with, the following is noted:

This position requires the occupant to perform statutory legal functions as required. Therefore, legal qualifications and admission as a practitioner of the High Court or the Supreme Court of a State or Territory of Australia is (sic) essential.⁹¹

231 It also cannot go unnoticed that the first selection criterion recorded on the position description reads as follows:

Demonstrated ability to undertake high level legal and analytical work. Legal qualifications and admission as a practitioner of the High Court or the Supreme Court of a State or Territory of Australia.

⁸⁸ Annexure EDR – 47.

⁸⁹ Public Service Gazette No PS38 – 22 September 2016, pp 28 – 29, Vacancy NN 10690165.

⁹⁰ Annexure EDR – 47.

⁹¹ Annexure EDR – 48.

5.3.2 Ms Wu's application to fill vacancy NN 10690165

232 On Friday, 18 September 2020, Ms McMullan was provided with documents relating to the recruitment of Ms Caitlin Wu into the position of NCF Registrar.

233 Ms McMullan was provided with a copy of all the applications that each person applying for vacancy NN 10690165 had submitted. There were nine applications, including Ms Wu's application. Among the applicants was a barrister at the Victorian Bar, a government solicitor based at ASIC, a senior lawyer based at the Law Institute of Victoria (who had also been an associate in the intellectual property group at Norton Rose Fulbright) and a senior associate at Norton Rose Fulbright. The educational attainments of most of the identified applicants was at the graduate level (i.e. Master of Laws).

234 Based on the date of the letter of introduction addressed to Ms Andrea Jarratt that Ms Wu submitted, it would appear that Ms Wu submitted her application on or about 5 October 2016. A copy of Ms Wu's letter of introduction to Ms Jarratt is set out in the form of Annexure EDR – 49.

235 Ms Wu also attached her resume to the application that she submitted. A copy of Ms Wu's resume is set out in the form on Annexure EDR – 50.

236 A copy of the digital application form that Ms Wu completed and submitted was also provided to Ms McMullan on Friday, 18 September 2020. A copy the digital application form that Ms Wu completed and submitted pursuant to her application to fill vacancy NN 10690165 is set out in the form of Annexure EDR – 51.

237 The application form required applicants to 'provide a response against the following selection criteria'.⁹² One criterion was '[I]legal qualifications and admission as a practitioner of the High Court or the Supreme Court of a State or Territory of Australia'. Ms Wu's response to this criterion reads as follows:

I graduated from Monash University in 2014 with a Bachelor of Laws and Bachelor of Arts. Although I am not currently admitted as a practitioner, I intend to enrol and become admitted

⁹² Annexure EDR – 51.

in 2017. I have significant practical experience working in a commercial law firm as a paralegal for a number of years, and substantial knowledge gained from my time at the Federal Court.

238 It is plainly apparent that Ms Wu was not admitted to the Supreme Court of a State or Territory of Australia or the High Court of Australia at the relevant time. Moreover, a perusal of Ms Wu's resume will demonstrate that Ms Wu had not at the time of her application completed any practical legal training.⁹³

5.3.3 Selection report in respect of vacancy NN 10690165

239 On Friday, 18 September 2020, Ms McMullan was provided with documents relating to the recruitment of Ms Caitlin Wu into the position of NCF Registrar.

240 Ms McMullan was provided with a copy of the selection report for an NCF Registrar position in the Federal Court of Australia Statutory Agency. A copy of that selection report is reproduced in the form of Annexure EDR – 53.

241 According to the selection report, the panel was constituted by Ms Sia Lagos, Mr David Pringle and Ms Andrea Jarratt. All members of the panel signed the report on 2 December 2016.

242 At the time that she was a member of the selection panel, Ms Lagos was the National Operations Registrar. At the time that Ms Lagos was a member of the selection panel, the National Operations Registrar position bore an SES2 classification.⁹⁴ Ms Lagos was the chairperson of the selection panel.⁹⁵ Ms Lagos also appears to have been the agency head's delegate (of the Federal Court of Australia Statutory Agency) and appears to have endorsed the

⁹³ 'Practical legal training' is a term of art. It refers to the training that an aspirant for admission to the Supreme Court of New South Wales or the Supreme Court of Victoria is to complete. For an exposition of what is required for admission to the Supreme Court of New South Wales, please refer to part 4.1.3.2 of the internal disclosure report that is replicated in Annexure EDR – 51 in support of this external disclosure report. The state of the law in respect of admissions is near uniform in Victoria because the States of New South Wales and Victoria have adopted a uniform law in respect of admission.

⁹⁴ According to the 2015-2016 annual report of the Federal Court of Australia, Ms Sia Lagos was, as at 30 June 2016, an SES2 employee – see Federal Court of Australia, *Annual Report 2015-2016*, 194. According to the 2016-2017 annual report of the Federal Court of Australia, Ms Sia Lagos was, as at 30 June 2017, an SES2 employee – see Federal Court of Australia, *Annual Report 2016-2017*, 201. In the absence of more solid evidence, it seems to me reasonable to provisionally conclude that because Ms Lagos was an SES2 employee on 30 June 2016 and an SES2 employee on 30 June 2017, it is very likely that Ms Lagos was an SES2 employee while she was in the process of recruiting an NCF Registrar in the latter half of 2016.

⁹⁵ Annexure EDR – 53.

selection panel's recommendation to promote Ms Wu to the position of NCF Registrar after conducting the recruitment exercise to fill vacancy NN 10690165.⁹⁶

243 At the time that he was a member of the selection panel, Mr Pringle was the Deputy National Operations Registrar. At the time that Mr Pringle was a member of the selection panel, the Deputy National Operations Registrar position might have borne an SES1 classification.⁹⁷

244 At the time that she was a member of the selection panel, Ms Jarratt was the Director of National Operations.

245 The members of the selection panel formed the view that Ms Wu was the most meritorious candidate among the candidates and, on that basis, Ms Lagos recommended that Ms Wu be promoted to the position of NCF Registrar.⁹⁸

5.3.4 Letter of offer of promotion

246 On Friday, 18 September 2020, Ms McMullan was provided with documents relating to the recruitment of Ms Caitlin Wu into the position of NCF Registrar.

247 Ms McMullan was provided with a copy of the letter of offer of promotion that Ms Jarratt provided to Ms Wu. A copy of that letter of offer of promotion is reproduced in the form of Annexure EDR – 54.

248 According to the letter of offer of promotion, which is dated 5 December 2016, it would appear that Ms Jarratt promoted Ms Wu pursuant to a delegation of authority.⁹⁹ An excerpt from the second page of the letter of offer of promotion reads as follows:

As a delegate of the Federal Court of Australia under the Public Service Act 1999 (the Act),¹⁰⁰
I:

⁹⁶ Annexure EDR – 53.

⁹⁷ According to the 2015-2016 annual report of the Federal Court of Australia, Mr Pringle was not, as at 30 June 2016, an SES employee – see Federal Court of Australia, *Annual Report 2015-2016*, 194. According to the 2016-2017 annual report of the Federal Court of Australia, Mr Pringle was, as at 30 June 2017, an SES1 employee – see Federal Court of Australia, *Annual Report 2016-2017*, 201. In the absence of more solid evidence, it seems to me reasonable to provisionally conclude that it is possible that Mr Pringle was an SES1 employee while he was in the process of recruiting an NCF Registrar in the latter half of 2016.

⁹⁸ Annexure EDR – 53.

⁹⁹ Annexure EDR – 54.

¹⁰⁰ This is a bizarre passage. The agency head of a statutory agency (such as the Federal Court of Australia Statutory Agency) can delegate his or her powers or function under the PS Act pursuant to subsection 78(7) of the

- i. agree to the movement of the person as specified above;
- ii. allocate the classification specified above to that Employee under the Public Service Classification Rules 2000;
- iii. assign the duties specified above to that employee under section 25 of the Act.

The Assignment of Duties will take effect on the date of effect specified above, or otherwise agreed.

249 Ms Wu accepted the offer of promotion on 5 December 2016.¹⁰¹

5.3.5 Notification of promotion NN 10698155

250 On Friday, 18 September 2020, Ms McMullan was provided with documents relating to the recruitment of Ms Caitlin Wu into the position of NCF Registrar.

251 Ms McMullan was provided with a promotion notification for an NCF Registrar position in the Federal Court of Australia Statutory Agency. A copy of that promotion notice is reproduced in the form of Annexure EDR – 55.

252 The relevant promotion number was NN 10698155. The promotion notice which Ms McMullan was provided with broadly corresponds to the promotion notice that I had identified in my internal disclosure report at part 6.1. At part 6.1 of my internal disclosure report, I had noted:

By December 2016, Ms Wu had been promoted to the position of NCF Registrar. This is apparent as a promotion decision is recorded in Public Service Gazette No PS49 – 8 December 2016. On page 232 Public Service Gazette No PS49 – 8 December 2016, there is a reference to a promotion decision. The relevant promotion reference in Promotion NN 10698155, and the reference includes Ms Wu's name and APS Number (843-81145).¹⁰²

PS Act but the Federal Court of Australia, whether that is a reference to the Court in the strict sense (i.e. in the sense of section 5 of the *Federal Court of Australia Act 1976* (Cth)) or to the Federal Court of Australia Statutory Agency (as defined in section 18ZE of the *Federal Court of Australia Act 1976* (Cth)), is not capable of providing a delegation of authority under the PS Act.

¹⁰¹ Annexure EDR – 54.

¹⁰² Public Service Gazette No PS49 – 8 December 2016, p 232, Promotion NN 10698155.

5.4 Final report of the PID investigation

253 Ms McMullan noted that the investigation report into the internal disclosure that I had made to an authorised officer in the Office of the Commonwealth Ombudsman on Monday, 23 March 2020 had been 'finalised at 6.35 pm on 9 December 2020' and that the report consisted of ten pages.¹⁰³ Ms McMullan also noted that she was considering 'deleting material from the investigation report pursuant to subsection 51(5) of the *Public Interest Disclosure Act 2013*' and, for that reason, she had yet to furnish me with a copy of her investigation report.

254 On Wednesday, 23 December 2020, Ms McMullan provided a redacted copy of her investigation report to me, which is reproduced in the form of Annexure EDR – 11.

255 On Wednesday, 23 December 2020, Ms McMullan sent an email to Ms Lagos.¹⁰⁴ Attached to Ms McMullan's email to Ms Lagos was a document containing substantive correspondence about the findings Ms McMullan made as part of her investigations into the internal disclosure that I had made to an authorised officer in the Office of the Commonwealth Ombudsman on Monday, 23 March 2020. That item of correspondence is replicated in the form on Annexure EDR – 46B.

256 Since the investigation report furnished to me by Ms McMullan has been redacted, it would be difficult for someone who is unfamiliar with the content of the internal disclosure report to make sense of Ms McMullan's redacted investigation report. In what follows in part 5 of this external disclosure report, I will try to, as part of my attempts to reproduce parts of Ms McMullan's redacted investigation report, reconstruct the redacted parts of the redacted investigation report with what strike me as words or passages that would plausibly and probably have been in the investigation report before redactions were made to the investigation report.

257 I propose to reconstruct the redacted investigation report to demonstrate why:

- it is my belief that the response to the investigation conducted by Ms McMullan was inadequate; and
- it is my belief that Ms McMullan's investigation was inadequate.

¹⁰³ Annexure EDR – 10.

¹⁰⁴ Annexure EDR – 46A.

5.4.1 Relevant extracts from the final report of the PID investigation

258 The relevant extracts from the redacted final investigation report Ms McMullan prepared into allegations about irregular and unlawful recruitment practices relating to the recruitment of Ms Wu read as follows.¹⁰⁵

I, Kate McMullan, A/g Assistant Commissioner Integrity Performance and Employment Policy, and delegate of the principal officer of the Australian Public Service Commission, have prepared this investigation report in accordance with section 51 of the *Public Interest Disclosure Act 2013* (PID Act) and section 13 of the *Public Interest Disclosure Standard 2013* (PID Standard).

The investigation report relates to the following disclosure:

Discloser's pseudonym	[REDACTED]
Discloser's email address	[REDACTED]
Agency the disclosure relates to	[REDACTED]
Date of allocation to the Commission	11 May 2020
Date of this decision	9 December 2020

Matters considered

In preparing this disclosure report I have considered the following relevant matters:

- Disclosure report and attachments, provided to the APSC upon allocation on 11 May 2020 (as well as supplementary information and correspondence from discloser on 7 August 2020, 17 August 2020, 25 September 2020, 1 November 2020, 2 November 2020, 3 November 2020, 4 November 2020 and 11 November 2020) outlining disclosures amounting to allegations that proper recruitment practices were not undertaken with respect to the recruitment processes leading to the appointment of:
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]

¹⁰⁵ Annexure EDR – 11.

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- Materials provided by the [REDACTED] on 18 September 2020, 27 October 2020, 23 November 2020 and 24 November 2020 about the process underpinning the engagement of the each of the persons above, in response to requests for information from me.

Duration of investigation

This investigation commenced from the date of allocation on 11 May 2020 and the due date for the completion of the investigation was 9 August 2020. On 7 August 2020 the Commonwealth Ombudsman granted an extension of 92 days until 9 November 2020. On 6 November the Commonwealth Ombudsman granted a further extension until 9 December 2020. The investigation and this report was completed on 9 December 2020, being a total of 212 days from the date of allocation and within the timeframe permitted ...

Disclosure with regard to the promotion of [REDACTED]

Allegations

The discloser alleged that, on [REDACTED] was promoted into the position of [REDACTED] for which [REDACTED] did not hold the advertised essential requirement of [REDACTED].

Relevant evidence

Vacancy notice [REDACTED] listed [REDACTED] as an essential role requirement for the advertised [REDACTED] position.

According to materials provided by [REDACTED] in support of [REDACTED] application for the position, [REDACTED] did not have, and was not eligible [REDACTED] when appointed to the position. Nor was [REDACTED] as a [REDACTED] or the [REDACTED]. [REDACTED] application asserted that [REDACTED] was [REDACTED]. No specific timeframes were offered in the application. [REDACTED] eligibility for [REDACTED] was not addressed in the selection report, nor in the letter of offer to [REDACTED]. Noting that [REDACTED] Curriculum Vitae (CV) and application indicate that [REDACTED] highest qualification at the time was a [REDACTED] (ie [REDACTED] did not indicate that [REDACTED] held, or was undertaking, a [REDACTED] program, or its equivalent leading to [REDACTED]), the evidence indicates that, on the balance of probabilities, [REDACTED]

was not eligible to [REDACTED] and would not be eligible for some 6-12 months. When this was put to the [REDACTED], they confirmed that, at the time of the recruitment:

- [REDACTED] was not [REDACTED];
- There is nothing to suggest that, at that time, [REDACTED] had completed or commenced a [REDACTED] program or equivalent;
- The consideration by the selection panel about [REDACTED] eligibility was "limited to ... [REDACTED] having graduated ... [REDACTED] with a [REDACTED] and [REDACTED] intention to [REDACTED].

Relevant legislation

Section 10A of the Public Service Act 1999 (PS Act) sets out the APS Employment Principles. Relevantly, paragraph 10A(1)(c) of the PS Act recognises that the APS is a career-based public service that makes decisions relating to engagement and promotion that are based on merit. For the purposes of paragraph 10A(1)(c) of the PS Act, subsection 10A(2) of the PS Act sets out the circumstances in which a decision relating to engagement or promotion is based on merit.

Findings

On the basis of the relevant evidence I have considered, I find on the balance of probabilities that [REDACTED] did not hold an essential qualification for the position, and that no reasonable efforts were made throughout the selection process to determine whether [REDACTED] was eligible to be [REDACTED]. I therefore find on the balance of probabilities that the recruitment process that ultimately led to the [REDACTED] promoting [REDACTED] into this position did not comply with the APS Employment Principles under subsection 10A(2) of the PS Act in one or more of the following respects:

- a. All eligible members of the community were not given a reasonable opportunity to apply to perform the relevant duties, because:
 - i. if [REDACTED] was not essential for performance of the role, listing it as an essential requirement in the advertisement may have precluded other members of the community with the same qualifications as [REDACTED] from applying for the position
- b. An assessment was not made of the relative suitability of the candidates to perform the relevant duties, using a competitive selection process, because:

- i. [REDACTED] is listed as essential for performance of the role, but does not appear to have been considered as part of the selection process.
- c. The assessment was not based on the relationship between the candidates' work-related qualities and the work-related qualities genuinely required to perform the relevant duties, because:
 - i. [REDACTED] was listed as essential for performance of the role, i.e. as a work-related quality genuinely required to perform the relevant duties. [REDACTED] did not have this work-related quality, and was selected over a field of candidates all of whom did have this work-related quality.
- d. The assessment did not focus on the relative capacity of the candidates to achieve outcomes related to the relevant duties, because:
 - i. The position description notes that the position "requires the occupant to perform [REDACTED] ... therefore [REDACTED] and [REDACTED] ... is essential". [REDACTED] was not [REDACTED] but was selected over a field of candidates all of whom were [REDACTED].

I find that the APS Employment Principles were not followed in relation to the recruitment process that led to the promotion of [REDACTED] because either:

- a. the role was incorrectly advertised as having an essential requirement, and this potentially precluded eligible members of the community from applying for the position; or
- b. a candidate who did not meet an essential requirement of the role (and who was not going to become eligible for some substantial period) was engaged over numerous candidates who did meet this requirement.

I find that the relevant employment practices of [REDACTED] were therefore in contravention of section 10A of the PS Act, and that disclosable conduct, within the meaning of item 1 of the table in subsection 29(1) of the PID Act, has therefore been engaged in by [REDACTED] on the basis that the relevant employment practice in relation to the engagement of [REDACTED] was conducted in contravention of the PS Act, being a Commonwealth law.

I recommend that [REDACTED] staff be provided with guidance and/or training about the APS Employment Principles prior to undertaking any recruitment action, to prevent further incidents of this nature.

I also recommend that relevant [REDACTED] staff familiarise themselves with the APS Code of Conduct, and in particular subparagraph 13(11)(a) of the Public Service Act 1999, which states, relevantly, that employees must at all times behave in a way that upholds the APS Employment Principles.

5.4.2 Relevant extracts from correspondence Ms McMullan sent to the agency head of the Federal Court of Australia Statutory Agency on Wednesday, 23 December 2020

259 On Wednesday, 23 December 2020, Ms McMullan sent an email to Ms Lagos.¹⁰⁶
Ms McMullan's email to Ms Lagos, dated Wednesday, 23 December 2020, reads as follows:

Dear Ms Lagos,

Please see attached correspondence in regard to a public interest disclosure matter.

Regards

Kate

260 Attached to Ms McMullan's email was a document containing substantive correspondence about the findings Ms McMullan made as part of her investigations into the public interest disclosure allocated to the APSC on Monday, 11 May 2020. That item of correspondence is replicated in the form of Annexure EDR – 46B and reads as follows:

I am writing to notify you of the outcome the findings and recommendations I have made concerning recruitment practices at the Federal Court of Australia (FCA).

As you will recall from my previous correspondence to you, a public interest disclosure concerning certain recruitment practices at the FCA was allocated to the Australian Public Service Commission for investigation under the Public Interest Disclosure Act 2013 (PID Act).

I hold a delegation under section 77 of the PID Act to conduct the PID investigation and prepare a report, which I finalised on 9 December 2020.

Summary of allegations and evidence

¹⁰⁶ Annexure EDR – 46A.

The discloser made a range of allegations concerning the recruitment practices of the FCA, broadly being that the following recruitment processes were not properly gazetted nor properly undertaken:

- a. engagements of Susan O'Connor, Claire Gitsham, Matthew Benter, Phillip Allaway, Rupert Burns and Tuan Van Le as National Judicial Registrars in the FCA;
- b. engagements of Murray Belcher and Russell Trott as National Judicial Registrar and District Registrars in the FCA; and
- c. engagements of Rohan Muscat and Caitlin Wu to National Registrar positions in the FCA.

Between 10 September 2020 and 27 October 2020 I sought, and you provided, information about each of those recruitment processes. The information the FCA provided included extensive information about each recruitment process, relevant gazettal information and a role review process that had resulted in certain positions being found suitable for either a Legal 2 or SESBI position, depending on the relative complexity and work load in relevant registries.

Following my review of the evidence provided by you up to 27 October 2020, I was satisfied that the allegations of disclosable conduct concerning each of the recruitment processes was not substantiated, except in relation to the promotion of Ms Wu to a National Registrar position.

On 16 November 2020 I provided the relevant allegations, evidence and my potential adverse findings in relation to the recruitment process concerning Ms Wu to you to afford you and the FCA the opportunity to provide further evidence or comments for my consideration.

On 23 and 24 November 2020 the FCA provided me with further information and statements concerning that recruitment process. The relevant allegations, evidence and findings are set out below.

Promotion of Caitlin Wu

Allegations

The disclosure alleged that, on 5 December 2016, Ms Caitlin Wu was promoted into the position of National Court Framework Registrar, for which she did not hold the advertised essential role requirement of being admitted as a practitioner of the High Court or the Supreme Court of a State or Territory of Australia.

Relevant evidence

Vacancy notice 10690165, as provided by you, listed "admission as a practitioner of the High Court or the Supreme Court of a State or Territory of Australia" as an essential role requirement for the advertised position.

According to materials provided by Ms Wu in support of her application for the position and your further evidence, Ms Wu did not have, and was not eligible to hold, a practicing certificate when appointed to the position.

Eligibility for admission was not addressed in the selection report, nor in the letter of offer to Ms Wu.

When this was put to you and the FCA for comment, the FCA confirmed that, at the time of recruitment:

- a. Ms Wu was not admitted as a legal practitioner;
- b. There was nothing to suggest that, at that time, Ms Wu had completed nor commenced a Practical Legal Training program or equivalent; and
- c. The consideration by the selection panel about Ms Wu's eligibility was "limited to her having graduated ... in 2014 with a Bachelor of Laws and her intention to enrol and become admitted in 2017"

Relevant legislation

Section 10A of the Public Service Act 1999 (PS Act) sets out the APS Employment Principles. Relevantly, paragraph 10A(1)(c) of the PS Act recognises that the APS is a career-based public service that makes decisions relating to engagement and promotion that are based on merit. For the purposes of paragraph 10A(1)(c) of the PS Act, subsection 10A(2) of the PS Act sets out the circumstances in which a decision relating to engagement or promotion is based on merit.

Adverse findings concerning the recruitment processes of the FCA

On the basis of the relevant evidence I have considered, I have found on the balance of probabilities that Ms Wu did not hold an essential qualification for the position and that no reasonable efforts were made throughout the selection process to determine whether she was eligible to be admitted to practice.

I therefore have found on the balance of probabilities that the recruitment process that ultimately led to the FCA promoting Ms Wu into this position did not have comply with the APS Employment Principles under subsection 10A(2) of the PS Act in one or more the following respects:

- a. All eligible members of the community were not given a reasonable opportunity to apply to perform the relevant duties, because:
 - i. if admission as a legal practitioner was not essential for performance of the role, listing it as an essential requirement in the advertisement may have precluded other members of the community with the same qualifications as Ms Wu from applying for the position.
- b. An assessment was not made of the relative suitability of the candidates to perform the relevant duties, using a competitive selection process, because:
 - i. admission as a legal practitioner is listed as essential for performance of the role, but does not appear to have been considered as part of the selection process.
- c. The assessment was not based on the relationship between the candidates' work-related qualities and the work-related qualities genuinely required to perform the relevant duties, because:
 - i. admission as a legal practitioner was listed as essential for performance of the role, i.e. as a work-related quality genuinely required to perform the relevant duties. Ms Wu did not have this work-related quality, and was selected over a field of candidates all of whom did have this work-related quality.
- d. The assessment did not focus on the relative capacity of the candidates to achieve outcomes related to the relevant duties, because:
 - i. The position description notes that the position "requires the occupant to perform statutory legal functions ... therefore, legal qualifications and admission as a practitioner ... is essential". Ms Wu was not admitted as a legal practitioner but was selected over a field of candidates all of whom were admitted as legal practitioners.

On the basis of the evidence I have considered, I have made a finding that the APS Employment Principles were not followed in relation to the recruitment process that led to the promotion of Ms Wu because either:

- a. the role was incorrectly advertised as having an essential requirement, which potentially precluded eligible members of the community from applying for the position; or

- b. a candidate who did not meet an essential requirement of the role was engaged over numerous candidates who did meet this requirement.

I also found that the relevant employment practices of the FCA were therefore in contravention of section 10A of the PS Act, and that disclosable conduct, within the meaning of item 1 of the table in subsection 29(1) of the PID Act, had therefore been engaged in by the FCA on the basis that the relevant employment practice of the FCA in relation to the engagement of Ms Wu was conducted in contravention of the PS Act, being a Commonwealth law.

I note for completeness that I have drawn a distinction between the process concerning Ms Wu, and that concerning Mr Muscat, in which similar allegations had been made. This was on the basis that:

- a. in Mr Muscat's case, there was a clear pathway to eligibility within a reasonable time after the recruitment process, which was signalled in his application and CV; and
- b. it was reasonable to expect that other members of the community who had an anticipated date for admission to legal practice in the very near future would have felt it was open to them to apply for the position.

I therefore made no adverse findings of disclosable conduct in relation to that recruitment process.

Recommendations

In response to my adverse findings concerning the recruitment practices of the FCA, I recommend:

- a. that staff at the FCA be provided with guidance and/or training about the APS Employment Principles prior to undertaking any recruitment action, to prevent further incidents of this nature; and
- b. relevant FCA staff familiarise themselves with the APS Code of Conduct, and in particular paragraph 13(11)(a) of the PS Act, which states, relevantly, that employees must at all times behave in a way that upholds the APS Employment Principles.

While I did not make any adverse findings concerning the engagement of Mr Muscat, as a matter of best practice it may have been advisable for the selection panel to more explicitly record the reason for shortlisting, interviewing and selecting such a candidate. I reiterate my recommendation that FCA staff be provided with guidance and/or training about the APS Employment Principles prior to undertaking any recruitment action.

Additionally, while I did not make any adverse findings in relation to the other recruitment processes undertaken by the FCA, I note that more clear and transparent communications from the FCA about the role review process, including the changing nature of the National Judicial Registrar role to allow it to be held at either a Legal 2 or SESBI position level, may have been advisable to reduce the risk of misunderstanding in relation to those roles. I have therefore recommended that future FCA role reviews or restructuring exercises are communicated to staff in a transparent and clear way to reduce the risk of misunderstanding and/or misinformation.

Next Steps

As the Agency Head of the FCA, you are responsible for responding to the findings and recommendations of the report.

I remind you that under the PID Act it is an offence to take reprisal action against any person on the basis that they or any other person made, or may have made, a disclosure under the PID Act, or to reveal the identity of a discloser. Given this and the sensitive nature of PID investigations, I would therefore appreciate your ongoing discretion in responding to this investigation, and ask that this correspondence, and all information relating to this PID investigation, is treated on a confidential and need-to-know basis only.

Thank you for the assistance you and the FCA have provided to me over the course of the investigation.

If you would like clarity about any of the findings or recommendations, please contact me on [telephone number] or at pid@apsc.gov.au.

5.4.3 Reconstruction of relevant extracts of the final report of the PID investigation prepared by Ms McMullan based on the correspondence Ms McMullan sent to the agency head of the Federal Court of Australia Statutory Agency on Wednesday, 23 December 2020, other evidence and my knowledge of the disclosable conduct

261 Since the investigation report furnished to me by Ms McMullan has been redacted, it would be difficult for someone who is unfamiliar with the content of the internal disclosure report to make sense of Ms McMullan's redacted investigation report. In what follows, I will, to the best of my ability and as appropriate, attempt to reconstruct the redacted parts of the redacted investigation report with what strike me as words or passages that would plausibly and probably have been in the investigation report before redactions were made to the investigation report. I will rely on my knowledge of the disclosable conduct, evidence and correspondence referred to in part 4 of this external disclosure report and Ms McMullan's correspondence to the agency head of the Federal Court of Australia Statutory Agency on Wednesday,

23 December 2020 to reconstruct the redacted parts of the redacted final report of the PID investigation dated Wednesday, 9 December 2020 and reproduced in the form of Annexure EDR – 11.

262 The reconstructed parts of the extracts of the final report of the PID investigation prepared by Ms McMullan will be, for ease of identification, recorded in red coloured text. I note at the outset that, while I suspect that Ms McMullan used the acronym 'FCA' throughout the final report of her PID investigation to refer to the Federal Court of Australia Statutory Agency, I will, as appropriate, refer to the Federal Court of Australia Statutory Agency as the 'FCASA' when reconstructing parts of the relevant extracts of the redacted final report of the PID investigation. I also note that, where I am unable to infer a plausible and probable passage for any redacted part, I will not attempt to remove the '[REDACTED]' placeholder.

263 The reconstructed version of relevant extracts of the final report of the PID investigation is set out below.

I, Kate McMullan, A/g Assistant Commissioner Integrity Performance and Employment Policy, and delegate of the principal officer of the Australian Public Service Commission, have prepared this investigation report in accordance with section 51 of the *Public Interest Disclosure Act 2013* (PID Act) and section 13 of the *Public Interest Disclosure Standard 2013* (PID Standard).

The investigation report relates to the following disclosure:

Discloser's pseudonym	[REDACTED]
Discloser's email address	[REDACTED]
Agency the disclosure relates to	Federal Court of Australia Statutory Agency
Date of allocation to the Commission	11 May 2020
Date of this decision	9 December 2020

Matters considered

In preparing this disclosure report I have considered the following relevant matters:

- Disclosure report and attachments, provided to the APSC upon allocation on 11 May 2020 (as well as supplementary information and correspondence from discloser on 7 August 2020, 17 August 2020, 25 September 2020, 1 November 2020, 2 November 2020, 3 November 2020, 4 November 2020 and 11 November 2020) outlining disclosures amounting to allegations that proper recruitment practices were not undertaken with respect to the recruitment processes leading to the appointment of:

- Mr Murray Belcher
 - Mr Russell Trott
 - Ms Susan O'Connor
 - Ms Claire Gitsham
 - Mr Matthew Benter
 - Mr Rupert Burns
 - Mr Phillip Allaway
 - Mr Tuan Van Le
 - Ms Caitlin Wu
 - Mr Rohan Muscat
- Materials provided by the Federal Court of Australia Statutory Agency on 18 September 2020, 27 October 2020, 23 November 2020 and 24 November 2020 about the process underpinning the engagement of the each of the persons above, in response to requests for information from me.

Duration of investigation

This investigation commenced from the date of allocation on 11 May 2020 and the due date for the completion of the investigation was 9 August 2020. On 7 August 2020 the Commonwealth Ombudsman granted an extension of 92 days until 9 November 2020. On 6 November the Commonwealth Ombudsman granted a further extension until 9 December 2020. The investigation and this report was completed on 9 December 2020, being a total of 212 days from the date of allocation and within the timeframe permitted ...

Disclosure with regard to the promotion of Caitlin Wu

Allegations

The discloser alleged that, on 9 December 2016, Ms Wu was promoted into the position of NCF Registrar (vacancy NN 10690165) for which Ms Wu did not hold the advertised essential requirement of "legal qualifications and admission as a practitioner of the High Court or the Supreme Court of a State or Territory is essential".

Relevant evidence

Vacancy notice 10690165 listed "admission as a practitioner of the High Court or the Supreme Court of a State or Territory is essential" as an essential role requirement for the advertised NCF Registrar position.

According to materials provided by Ms Wu in support of her application for the position, Ms Wu did not have, and was not eligible for a certificate of admission to the Supreme Court

of a State or Territory or the High Court of Australia when appointed to the position. Nor was [REDACTED] as a [REDACTED] or the [REDACTED]. [REDACTED] application asserted that Ms Wu was “not currently admitted as a practitioner” but “intended to enrol and become admitted in 2017”. No specific timeframes were offered in the application. Ms Wu’s eligibility for admission as a practitioner was not addressed in the selection report, nor in the letter of offer to Ms Wu. Noting that Ms Wu’s Curriculum Vitae (CV) and application indicate that her highest qualification at the time was a Bachelor of Laws (ie Ms Wu did not indicate that she held, or was undertaking, a practical legal training program, or its equivalent leading to admission to the Supreme Court of a State or a Territory, or the High Court of Australia), the evidence indicates that, on the balance of probabilities, Ms Wu was not eligible to be admitted as a practitioner of the Supreme Court of a State or a Territory, or the High Court of Australia, and would not be eligible for some 6-12 months. When this was put to the FCASA, they confirmed that, at the time of the recruitment:

- Ms Wu was not admitted as a practitioner of the Supreme Court of a State or a Territory, or the High Court of Australia;
- There is nothing to suggest that, at that time, Ms Wu had completed or commenced a practical legal training program or equivalent;
- The consideration by the selection panel about Ms Wu’s eligibility was “limited to ... [Ms Wu] having graduated ... in 2014 with a Bachelor of Laws and Bachelor of Arts and her intention to enrol and become admitted in 2017”.¹⁰⁷

Relevant legislation

Section 10A of the Public Service Act 1999 (PS Act) sets out the APS Employment Principles. Relevantly, paragraph 10A(1)(c) of the PS Act recognises that the APS is a career-based public service that makes decisions relating to engagement and promotion that are based on merit. For the purposes of paragraph 10A(1)(c) of the PS Act, subsection 10A(2) of the PS Act sets out the circumstances in which a decision relating to engagement or promotion is based on merit.

Findings

On the basis of the relevant evidence I have considered, I find on the balance of probabilities that Ms Wu did not hold an essential qualification for the position, and that no reasonable efforts

¹⁰⁷ As to which, see SDT’s email to K Mc dated 24 11 2020.

were made throughout the selection process to determine whether Ms Wu was eligible to be admitted as a practitioner of the Supreme Court of a State or Territory. Or the High Court of Australia. I therefore find on the balance of probabilities that the recruitment process that ultimately led to the FCASA promoting Ms Wu into this position did not comply with the APS Employment Principles under subsection 10A(2) of the PS Act in one or more of the following respects:

- a. All eligible members of the community were not given a reasonable opportunity to apply to perform the relevant duties, because:
 - i. if admission as a practitioner of the Supreme Court of a State or a Territory, or the High Court of Australia was not essential for performance of the role, listing it as an essential requirement in the advertisement may have precluded other members of the community with the same qualifications as Ms Wu from applying for the position
- b. An assessment was not made of the relative suitability of the candidates to perform the relevant duties, using a competitive selection process, because:
 - i. admission as a practitioner of the Supreme Court of a State or a Territory, or the High Court of Australia is listed as essential for performance of the role, but does not appear to have been considered as part of the selection process.
- c. The assessment was not based on the relationship between the candidates' work-related qualities and the work-related qualities genuinely required to perform the relevant duties, because:
 - i. admission as a practitioner of the Supreme Court of a State or a Territory, or the High Court of Australia was listed as essential for performance of the role, i.e. as a work-related quality genuinely required to perform the relevant duties. Ms Wu did not have this work-related quality, and was selected over a field of candidates all of whom did have this work-related quality.
- d. The assessment did not focus on the relative capacity of the candidates to achieve outcomes related to the relevant duties, because:
 - i. The position description notes that the position "requires the occupant to perform statutory legal function, as required ... therefore legal qualifications and admission as a practitioner of the High Court or the Supreme Court of a State or Territory ... is essential". Ms Wu was not admitted as a practitioner of the Supreme Court of a State or Territory, or the High Court of Australia but

was selected over a field of candidates all of whom were admitted to practice in the Supreme Court of a State or Territory, or the High Court of Australia.

I find that the APS Employment Principles were not followed in relation to the recruitment process that led to the promotion of Ms Wu because either:

- a. the role was incorrectly advertised as having an essential requirement, and this potentially precluded eligible members of the community from applying for the position; or
- b. a candidate who did not meet an essential requirement of the role (and who was not going to become eligible for some substantial period) was engaged over numerous candidates who did meet this requirement.

I find that the relevant employment practices of the FCASA were therefore in contravention of section 10A of the PS Act, and that disclosable conduct, within the meaning of item 1 of the table in subsection 29(1) of the PID Act, has therefore been engaged in by the FCASA on the basis that the relevant employment practice in relation to the engagement of Ms Wu was conducted in contravention of the PS Act, being a Commonwealth law.

I recommend that FCASA staff be provided with guidance and/or training about the APS Employment Principles prior to undertaking any recruitment action, to prevent further incidents of this nature.

I also recommend that relevant FCASA staff familiarise themselves with the APS Code of Conduct, and in particular subparagraph 13(11)(a) of the Public Service Act 1999, which states, relevantly, that employees must at all times behave in a way that upholds the APS Employment Principles.

5.5 An assessment of the final report of the PID investigation

264 I reconstructed the redacted investigation report with a view to demonstrating why:

- it is my belief that the response to the investigation conducted by Ms McMullan was inadequate; and
- it is my belief that Ms McMullan's investigation was inadequate.

265 In what follows, I will assess the final report of the PID investigation prepared by Ms McMullan, and reconstructed in part 5.4.3, in order to demonstrate why it is my belief that Ms McMullan's investigation was inadequate. Other than what I briefly note here and in part 5.6, the adequacy of Ms McMullan's response to the investigation will not be addressed

as the investigation, as will be demonstrated, was inadequate. A response to an inadequate investigation is likely to be tainted by the inadequacy of the investigation. That is the case in this instance.

5.5.1 'I therefore find on the balance of probabilities that the recruitment process that ultimately led to the FCASA promoting Ms Wu into this position did not comply with the APS Employment Principles under subsection 10A(2) of the PS Act ...'

266 There is a fundamental flaw in the final investigation report Ms McMullan prepared into allegations about irregular and unlawful recruitment practices relating to the recruitment of Ms Wu and that flaw is, in my opinion, based on a misapprehension of the applicable law on the part of Ms McMullan.

267 The APS Employment Principles are set out in section 10A of the PS Act and, thus, form part of a law of the Commonwealth. For convenience, the APS Employment Principles are set out below:

The APS is a career-based public service that:

- (a) makes fair employment decisions with a fair system of review; and
- (b) recognises that the usual basis for engagement is as an ongoing APS employee; and
- (c) makes decisions in relation to engagement and promotion that are based on merit; and requires effective performance from each employee; and
- (d) provides flexible, safe and rewarding workplaces where communication, consultation, cooperation and input from employees on matter that affect their workplaces are valued; and
- (e) provides workplaces that are free from discrimination, patronage and favouritism; and
- (f) recognises the diversity of the Australia community and fosters diversity in the workplace.

268 Subsection 10A(2) of the PS Act provides:

For the purposes of [making a decision relating to engagement and promotion that is based on merit], a decision relating to engagement or promotion is based on merit if:

- (a) all eligible members of the community were given a reasonable opportunity to apply to perform the relevant duties; and
- (b) an assessment is made of the relative suitability of the candidates to perform the relevant duties, using a competitive selection process; and

- (c) the assessment is based on the relationship between the candidates' work-related qualities and the work-related qualities genuinely required to perform the relevant duties; and
- (d) the assessment focuses on the relative capacity of the candidates to achieve outcomes related to the relevant duties; and
- (e) the assessment focuses on the relative capacity of the candidates to achieve outcomes related to the relevant duties; and
- (f) the assessment is the primary consideration in making the decision.

269 When interpreting a provision of a statute, the interpreter must interpret the provision in a way that would 'best achieve the purpose or object of the [statute] (whether or not that purpose or object is expressly stated in the [statute])' and that interpretation 'is to be preferred to each other interpretation'.¹⁰⁸

270 The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.¹⁰⁹

271 The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of *all* the provisions of the statute. The meaning of the provision must be determined by reference to the language of the instrument *as a whole*.¹¹⁰

272 A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where the conflict appears to arise from the

¹⁰⁸ *Acts Interpretation Act 1901* (Cth), s 15AA. On the applicability of section 15AA to legislative instruments, notifiable instruments and other instruments, please refer to subsection 13(1) of the *Legislation Act 2003* (Cth) and subsection 46(1) of the *Acts Interpretation Act 1901* (Cth).

¹⁰⁹ *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34, [14].

¹¹⁰ *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28, [69].

language of particular provisions, the conflict must be alleviated, so far as is possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court to determine which is the leading provision and which the subordinate provision, and which must give way to the other. Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.¹¹¹

273 It cannot go unnoticed that the APS Employment Principles set out in section 10A of the PS Act refer to the 'APS' and the APS's role in making fair decisions, decisions based on merit and the like. It cannot go unnoticed that the APS Employment Principles set out in section 10A of the PS Act do not refer to a Statutory Agency, as that word is defined in section 7 of the PS Act, as having a role in making fair decisions, decisions based on merit and the like.

274 When one construes section 10A in the light of the other provisions of the PS Act, the following obtains.

275 First, it is not open for a person interpreting the PS Act to conclude that the 'APS', referred to in section 10A of the PS Act, constitutes an entity that is independent (in terms of legal consequences or incidents, like legal personality) of its constituents in the way that a body corporate is independent of its corporators or directors. In the light of section 9 of the PS Act, the better view is to conclude that the reference to the 'APS' in section 10A is a shorthand for the collective of employees of the Commonwealth, being persons engaged under either section 22 or section 72 of the PS Act, and Agency Heads. Accordingly, it would not be open for a person interpreting section 10A of the PS Act to conclude that, by implication or otherwise, the APS Employment Principles apply to the 'APS' in a sense where the APS is independent of its constituents and to which legal consequences or incidents apply independent of the consequences or incidents that apply to its constituents.

276 Second, it is not open for a person interpreting section 10A of the PS Act to conclude that section 10A, on its own, imposes a legal obligation on somebody or something. In the absence

¹¹¹ Ibid [70].

of paragraph 13(11)(a) of the PS Act, a person interpreting section 10A might have had to, by way of implication, discern on whom the obligations set out in section 10A of the PS Act would fall but, as has been noted:

[a] legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where the conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as is possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions.¹¹²

277 Properly construed, one must conclude that section 10A of the PS Act is, for want of a better description, a 'declaratory' provision; 'declaratory' in the sense that the content of obligations is declared in that provision. But section 10A of the PS Act does not, explicitly, impose any legal obligations on somebody or something when one accepts that the 'APS', referred to in section 10A of the PS Act, does not constitute an entity that is independent (in terms of legal personality) of its constituents in the way that a body corporate is independent of its corporators or directors. One must turn to the Code of Conduct set out in section 13 and, specifically, paragraph 13(11)(a) of the PS Act, as well as subsections 14(1) and 14(2) of the PS Act, to determine on whom the obligation to abide by the content set out in section 10A is imposed. The answer to the question 'to whom does the obligation to abide by the content set out in section 10A apply?' is the following: '[a]n **APS employee** must at all times behave in a way that upholds the APS Values and APS Employment Principles' (emphasis added). Subsection 14(1) of the PS Act extends the operation of the obligation on an APS employee to Agency Heads. Subsection 14(2) of the PS Act extends the operation of the obligation on an APS employee to statutory officer holders. This interpretation best gives effect to the purpose and language of those provisions while maintaining the unity of all the relevant statutory provisions.

278 Importantly, paragraph 13(11)(a), and subsection 14(1) and 14(2), of the PS Act set out, exhaustively, the class of somebodies or somethings that is bound to abide by the content set

¹¹² Ibid.

out in section 10A of the PS Act. A Statutory Agency, as that word is defined in the PS Act, is not bound by the content of section 10A of the PS Act, and with good reason.

279 A Statutory Agency is, for the purposes of the PS Act, an 'organising principle' through which the Commonwealth, a constitutional person, may, among other things, engage a person as an employee of the Commonwealth. It is a given that the Commonwealth, an abstraction that has legal personality, can only give effect to its will through the actions and omissions of people. That is because the Commonwealth does not have 'agency', in the philosophical sense of that word.

280 Statutory Agencies are ordinarily defined by reference to:

- a class, or classes, of employees; and
- an agency head; and
- possibly, statutory appointees and officers; and
- often, some purpose or end that the employees, agency head and others work towards or fulfil.

281 The Federal Court of Australia Statutory Agency is defined in section 18ZE of the *Federal Court of Australia Act 1976* (Cth). That section reads as follows:

18ZE Statutory Agency etc. for purposes of the Public Service Act 1999

(1) For the purposes of the Public Service Act 1999:

- (a) the persons referred to in subsection (2) together constitute a Statutory Agency; and
- (b) the Chief Executive Officer is the Head of that Statutory Agency.

(2) The persons are the following:

- (a) the Chief Executive Officer;
- (b) the APS employees referred to in the following provisions:
 - (i) section 18N of this Act;
 - (ii) section 38N of the Family Law Act 1975;
 - (iii) section 101, subsection 106(1), subsection 107(1), subsection 109(1), subsection 110(1), section 111A and section 112 of the *Federal Circuit Court of Australia Act 1999*;

(iv) subsection 130(3) of the Native Title Act 1993.

282 Ms McMullan's finding that 'the recruitment process that ultimately led to the FCASA promoting Ms Wu into this position did not comply with the APS Employment Principles under subsection 10A(2) of the PS Act ...' is without basis because the Federal Court of Australia Statutory Agency did not promote Ms Wu. A person, or people, who constitutes, or constitute, the Federal Court of Australia Statutory Agency, which has no independent legal personality, may be said to have promoted Ms Wu. But if Ms McMullan's interpretation is to be accepted, one implication is that Ms Wu, as well as every other person that constitutes the Federal Court of Australia Statutory Agency, failed to comply with subsection 10A(2) of the PS Act and, thus, contravened a law of the Commonwealth. That is absurd.

283 Moreover, and as articulated in part 5.5.1, the obligation to comply with the content set out in subsection 10A(2) of the PS Act lies, exhaustively, on the class of 'somebodies' or 'somethings' that is bound to abide by the content sent out in section 10A of the PS Act. That class is constituted by APS employees, Agency Heads and Statutory Office Holders. A finding that 'the recruitment process ... did not comply with the APS Employment Principles under subsection 10A(2) of the PS Act ...' is misconceived. It was not open to Ms McMullan to find that a process had failed to comply with subsection 10A(2) of the PS Act.

284 In making her findings, Ms McMullan fails to identify, and to attribute responsibility to, the APS employees, agency head or statutory office holders who contravened subsection 10A(2) of the PS Act and, instead, attributes responsibility for the contravention of a law of the Commonwealth on either a process or a statutory agency. Both these attributions are impermissible and are the consequence of a failure on the part of Ms McMullan to correctly apprehend and apply the relevant law.

285 Ms McMullan's conclusion that:

... the relevant employment practices of the FCASA were therefore in contravention of section 10A of the PS Act disclosable conduct, within the meaning of item 1 of the table in subsection 29(1) of the PID Act, has therefore been engaged in by the FCASA on the basis that the relevant employment practice in relation to the engagement of Ms Wu was conducted in contravention of the PS Act, being a Commonwealth law,

is wrong.

- 286 Paragraph 29(1)(a) of the PID Act defines disclosable conduct as 'conduct of a kind mentioned
in the ... table that is conduct engaged in by an agency'.
- 287 Item 1 of the table refers to 'conduct that contravenes a law of the Commonwealth, State or a
Territory'.
- 288 The law of the Commonwealth that Ms McMullan claims that the Federal Court of Australia
Statutory Agency contravened was the PS Act. As I have already explained, a statutory agency
is not capable of contravening the section 10A of the PS Act. That is a declaratory provision.
The obligation to abide by section 10A of the PS Act falls on APS employees, agency heads
and statutory office holders.
- 289 Paragraph 29(1)(a) of the PID Act does not alter the class of 'somebodies' or 'somethings' that
must abide by the section 10A of the PS Act. Indeed, paragraph 29(1)(a) does not alter any law
of the Commonwealth such that the application of that law extends to an agency about which
a complaint is made.
- 290 Properly understood, subsection 29(1) of the PID Act sets out the grounds upon which one may
make a disclosure about a public official, contracted services provider or agency, so long as the
threshold informational value in the disclosure (namely, 'tending to show'), or the discloser's
belief about the threshold information value in the disclosure, is, pursuant to section 26 of the
PID Act, met.
- 291 Subsection 29(1) of the PID Act is not a provision that extends the substance of the laws of the
Commonwealth, States or Territories, be that substance permissive, prohibitive, licensory,
obligatory or whatever else, to public officials, agencies or contracted service providers, as
those terms are defined in the PID Act. If that were the case, the Federal Court of Australia
Statutory Agency could, for example, be found to have engaged in the battery of an individual
because that tortious act was committed by a constituent member of the Federal Court of
Australia Statutory Agency. That is absurd, yet that conclusion would obtain if Ms McMullan's
line of reasoning is accepted as correct.

5.6 Correct findings in the light of the evidence

- 292 As I noted in part 5.3, on Friday, 18 September 2020, Ms McMullan was provided with documents relating to the recruitment of Ms Caitlin Wu into the position of NCF Registrar.¹¹³
- 293 Ms McMullan was provided with a copy of the selection report for an NCF Registrar position in the Federal Court of Australia Statutory Agency.¹¹⁴
- 294 According to the selection report, the panel was constituted by Ms Sia Lagos, Mr David Pringle and Ms Andrea Jarratt. All members of the panel signed the report on 2 December 2016. In so signing that report, the members of the panel acknowledged that they were aware of the correct policy and procedures for merit selection, and that they certified that the policy and procedures were followed.¹¹⁵
- 295 The members of the selection panel formed the view that Ms Wu was the most meritorious candidate and, on that basis, Ms Lagos recommended that Ms Wu be promoted to the position of NCF Registrar after conducting the recruitment exercise to fill vacancy NN 10690165.¹¹⁶
- 296 On Friday, 18 September 2020, Ms McMullan was provided with documents relating to the recruitment of Ms Caitlin Wu into the position of NCF Registrar.
- 297 Ms McMullan was provided with a copy of the letter of offer of promotion that Ms Jarratt provided to Ms Wu.¹¹⁷
- 298 According to the letter of offer of promotion, which is dated 5 December 2016, it would appear that Ms Jarratt promoted Ms Wu pursuant to a delegation of authority.¹¹⁸ An excerpt from the second page of the letter of offer of promotion reads as follows:

As a delegate of the Federal Court of Australia under the Public Service Act 1999 (the Act), I:

- i. agree to the movement of the person as specified above;

¹¹³ Refer to email of 18 September 2020.

¹¹⁴ Annexure EDR – 53.

¹¹⁵ Annexure EDR – 53.

¹¹⁶ Annexure EDR – 53.

¹¹⁷ Annexure EDR – 54.

¹¹⁸ Annexure EDR – 54.

- ii. allocate the classification specified above to that Employee under the Public Service Classification Rules 2000;
- iii. assign the duties specified above to that employee under section 25 of the Act.

The Assignment of Duties will take effect on the date of effect specified above, or otherwise agreed.

299 Ms Wu accepted the offer of promotion on 5 December 2016.¹¹⁹

300 Ms McMullan concluded that the promotion decision made to promote Ms Wu was not based on merit for the reasons set out in her correspondence to the agency head of the Federal Court of Australia Statutory Agency on Wednesday, 23 December 2020,¹²⁰ as well as her final report of the PID investigation.¹²¹ Therefore, subsection 10A(2) of the PS Act was not upheld.

301 Since only APS employees, agency heads and statutory office holders are capable of contravening paragraph 13(11)(a) of the PS Act, which requires them to at all times behave in a way that upholds subsection 10A(2) of the PS Act, Ms McMullan, having concluded that the promotion decision made to promote Ms Wu was not based on merit, should have, first, given Ms Lagos, Mr Pringle and Ms Jarratt opportunities to explain their decisions and, second, if those explanations were unacceptable, found that either one of Ms Lagos, Mr Pringle or Ms Jarratt, or any combination of them, was, or were, responsible for contravening paragraph 13(11)(a) of the PS Act, which requires them to at all times behave in a way that upholds subsection 10A(2) of the PS Act.

5.7 Likely failure to conduct investigation lawfully under the PID Act

302 Section 53 of the PID Act sets out the manner in which investigations under Part 3, Division 2 of the PID Act are to be conducted.

303 Subsection 53(1) of the PID Act is as follows:

An investigation under this Division by the principal officer of an agency is to be conducted as the person thinks fit.

¹¹⁹ Annexure EDR – 54.

¹²⁰ Annexure EDR – 46B.

¹²¹ Annexure EDR – 11.

304 Subsection 53(2) of the PID Act is as follows:

The principal officer may, for the purposes of the investigation, obtain information from such persons, and make such inquiries, as the principal officer thinks fit.

305 Paragraph 53(5)(b) of the PID Act is as follows:

Despite subsections (1) and (2) to the extent that the investigation relates to an alleged breach of the Code of Conduct (within the meaning of the Public Service Act 1999), the principal officer must comply with the procedures established under subsection 15(3) of that Act.

306 In the context of the internal disclosure investigated by Ms McMullan, the principal officer would be a reference to the Australian Public Service Commissioner, the principal officer of the APSC. It is beyond question that the investigation conducted by Ms McMullan related to alleged breaches of the Code of Conduct by Ms Lagos, Ms Pringle and Ms Jarratt. Accordingly, Ms McMullan was obligated to investigate those alleged breaches according to procedures established by the Australian Public Service Commissioner.

307 I downloaded a copy of the procedures to investigate alleged breaches of the Code of Conduct established by the Australian Public Service Commissioner on 30 December 2020.¹²² I shall refer to the procedures to investigate alleged breaches of the Code of Conduct established by the Australian Public Service Commissioner as the Code of Conduct procedures. It will be noted that the Code of Conduct procedures were last reviewed on 19 September 2019,¹²³ and, as such, were extant at the time of the investigation, being 11 May 2020 to 9 December 2020.

308 Paragraph 3 of the Code of Conduct procedures reads as follows:

As soon as practicable after a suspected breach of the Code has been identified and the Australian Public Service Commissioner, or a person authorised by the Commissioner, has decided to deal with the suspected breach under these procedures, the Commissioner or that person will appoint a decision-maker to make a determination under these procedures.

309 Paragraph 4 of the Code of Conduct procedures reads as follows:

¹²² Annexure EDR – 56.

¹²³ Annexure EDR – 56.

The role of the breach decision-maker is to determine in writing whether a breach of the Code has occurred.

310 Paragraph 5 of the Code of Conduct procedures reads as follows:

The breach decision-maker may undertake the investigation, or seek the assistance of an investigator. The investigator may investigate the alleged breach, gather evidence and make a report of recommended findings of fact to the breach decision-maker.

311 Paragraph 6 of the Code of Conduct procedures reads as follows:

The person who is to decide what, if any, sanction is to be imposed on an APS employee who is found to have breached the Code will be a person holding a delegation of the powers under the Act to impose sanctions.

312 Paragraph 7 of the Code of Conduct procedures reads as follows:

These procedures do not prevent the breach decision-maker from being the sanction delegate in the same matter.

313 Paragraph 12 of the Code of Conduct procedures reads as follows:

A determination may not be made in relation to a suspected breach of the Code by a person unless reasonable steps have been taken to:

(a) inform the person of:

- (i) the details of the suspected breach of the Code, including any subsequent variation of those details; and
- (ii) where the person is an APS employee, the sanctions that may be imposed on them under subsection 15 (1) of the Act; and

(b) give the person a reasonable opportunity to make a statement in relation to the suspected breach.

314 Paragraph 17 of the Code of Conduct procedures reads as follows:

If a determination is made that an APS employee in the Commission has breached the Code, a sanction may not be imposed on the employee unless reasonable steps have been taken to:

(a) inform the employee of:

- (i) the determination that has been made; and
- (ii) the sanction or sanctions that are under consideration; and

(iii) the factors that are under consideration in determining any sanction to be imposed;
and

(b) give the employee a reasonable opportunity to make a statement in relation to the sanction or sanctions under consideration.

315 Paragraph 19 of the Code of Conduct procedures reads as follows:

If a determination is made in relation to a suspected breach of the Code by a person who is, or was, an APS employee in the Commission, a written record must be made of:

(a) the suspected breach; and

(b) the determination; and

(c) any sanctions imposed as a result of a determination that the employee has breached the Code; and

(d) if a statement of reasons was given to the person regarding the determination in relation to suspected breach of the Code, or, in the case of an employee, regarding the sanction decision, that statement of reasons or those statements of reasons.

316 In part 4.1 of this external disclosure report, I set out my views on the quality of the catalogue of materials that I had identified. Importantly, a thorough and, in my opinion, near complete catalogue of correspondence has been reproduced. There is nothing in the correspondence between Ms McMullan and Ms Lagos to suggest that, pursuant to paragraph 12 of the Code of Conduct procedures, Ms Lagos, Mr Pringle or Ms Jarratt were informed of the details of the suspected breach of the Code of Conduct (as has been explained, Ms McMullan concluded that something, rather than persons, had contravened the Code of Conduct for behaving in a way that did not uphold the APS Employment Principles), or the possible sanctions that may have been imposed on them.

317 There is nothing in the correspondence between Ms McMullan and Ms Lagos to suggest that, pursuant to paragraph 17 of the Code of Conduct procedures, Ms Lagos, Mr Pringle or Ms Jarratt were informed that a determination had been made that the Code of Conduct had been contravened by them, what sanctions were under consideration for the contraventions, and what factors were under consideration in determine any sanctions to be imposed.

318 There is nothing in the correspondence between Ms McMullan and Ms Lagos to suggest that, pursuant to paragraph 19 of the Code of Conduct procedures, a written record was made of the

contravention or the determination in respect of that contravention of the Code of Conduct or sanctions imposed as a result of the determination in respect of that contravention of the Code of Conduct, and that statements of reasons were provided to Ms Lagos, Mr Pringle or Ms Jarratt in relation to the contravention of the Code of the Conduct.

319 As such, it is most unlikely that the investigation conducted by Ms McMullan was conducted according to paragraph 53(5)(b) of the PID Act and was, thus, unlawful in that respect.

5.8 Conclusion

320 For the reasons set out in parts 5.5, 5.6 and 5.7, which support the conclusion that Ms McMullan failed to conduct her investigation relating to the allegations about the recruitment of Ms Wu into the Australian Public Service according to law, I believe that the investigation conducted by Ms McMullan and to the response to Ms McMullan's investigation were inadequate.

6. DISCLOSURE INVESTIGATION RELATING TO AN INTERNAL DISCLOSURE WAS CONDUCTED (WHETHER OR NOT UNDER PART 3 OF THE PID ACT), AND THE DISCLOSER BELIEVES ON REASONABLE GROUNDS THAT THE INVESTIGATION WAS INADEQUATE – ALLEGATIONS RELATING TO THE RECRUITMENT OF MR ROHAM MUSCAT

6.1 Allegations set out in the internal disclosure allocated to the APSC for handling on Monday, 11 May 2020

321 As has already been noted, the internal disclosure that I made to an authorised officer in the Office of the Commonwealth Ombudsman on Monday, 23 March 2020 was allocated to the APSC for handling on Monday 11, May 2020.

322 Part 4 of the internal disclosure report contained the allegations relating to the recruitment of Mr Rohan Muscat and how the Code of Conduct in the PS Act had been contravened. Part 4 of the internal disclosure report has not been replicated because I substantially reproduce it at the end of Part 6.

6.2 Transfer of investigation of contraventions of the Code of Conduct to the APSC

323 As was noted in part 2.1.3 of this external disclosure report, in part 7 of the internal disclosure report, I had set out my reasons as to why the internal disclosure had been made to an authorised officer in the Office of the Commonwealth Ombudsman. In part 7 of the internal disclosure report, I had formed the view that the ideal way to investigate the allegations set out in the